

IN RE BAR FIRST GO ROUND SALVAGE SALE ET AL.

IBLA 91-407 through 91-412

Decided December 17, 1991

Appeals from decisions of the Alsea and Yamhill, Oregon, Resource Area Managers, Bureau of Land Management, denying protests of timber sales. OR080-TS1-201 etc.

Affirmed.

1. Migratory Bird Conservation Act: Generally--Timber Sales and Disposals

The sale of timber by BLM does not involve a "taking" of migratory birds under the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1988). This Act was not intended to include habitat modification or degradation among its prohibitions.

2. Federal Land Policy and Management Act of 1976: Generally--Oregon and California Railroad and Reconveyed Coos Bay Grant Lands: Timber Sales--Timber Sales and Disposals

The O&C Act makes clear that the primary use of O&C lands is for timber production to be managed in conformity with the principle of sustained yield. BLM did not err in construing the O&C Act as establishing timber production as the dominant use, notwithstanding the provisions of FLPMA calling for multiple use.

3. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Timber Sales and Disposals

Where appellants protest a timber sale because of BLM's failure to address in an EA the impacts of the sale on the marbled murrelet, a robin-sized bird proposed for listing as threatened, the decision may be affirmed where the record on appeal fails to disclose any impact to the murrelet from the salvage sale of dead and blown-down timber.

4. Endangered Species Act of 1973: Section 7: Consultation

A decision denying a protest of a timber sale on the ground that BLM need not consult with FWS under sec. 7 of the ESA, 16 U.S.C. § 1536 (1988), when salvaging timber downed by a windstorm may be affirmed where the record fails to demonstrate that harvest plan features may affect the northern spotted owl.

APPEARANCES: Doug Heiken and Allen Hancock, Eugene, Oregon, for appellants; Howard J. Hunt, Alsea Area Manager (Acting), and Richard C. Prather, Yamhill Area Manager, Salem, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Oregon Natural Resources Council and the Alsea Chapter of the Coast Range Association have appealed from six separate decisions of the Alsea and Yamhill, Oregon, Resource Area Managers, Bureau of Land Management (BLM), each dated June 25, 1991, denying appellants' protest of certain timber sales in western Oregon. At issue here are six salvage sales of timber blown down by windstorms occurring in 1990 and 1991. 1/ By letter dated April 9, 1991, appellants filed a collective protest of all six of the sales asserting that the sales are unlawful and requesting withdrawal of the sales or a stay of the sales pending administrative review.

Appellants have again requested a stay of the timber sales pending review on appeal. 2/ Because such factors as likelihood of success on the merits and the impact of a stay on the public interest are key elements in considering a stay request, 3/ we have expedited our review of these appeals on the merits rather than consider the stay question separately.

1/ The sales are:

IBLA 91-407	Bar First Go Round	OR080-TS1-209
IBLA 91-408	Dutch Boys Salvage	OR080-TS1-202
IBLA 91-409	Maxfield Creek Salvage	OR080-TS1-201
IBLA 91-410	Briar Split Salvage	OR080-TS1-308
IBLA 91-411	Elk Run Salvage	OR080-TS1-311
IBLA 91-412	Hull Park/Bummer Ridge Salvage	OR080-TS1-307

2/ Unlike most administrative decisions, which are stayed during the time in which an appeal may be filed and during the pendency of any administrative appeal by an adversely affected party, see 43 CFR 4.21(a), the regulations at 43 CFR Part 5000 provide that upon denial of a protest the authorized officer may proceed to implement the timber sale. 43 CFR 5003.3(f). The BLM decisions under appeal indicated that BLM intended to implement the timber sales pursuant to this latter regulation.

3/ See Marathon Oil Co., 90 IBLA 236, 245-46, 93 I.D. 6, 11-12 (1986).

The protest challenged the purported failure of BLM to adopt the recommendations of the Interagency Scientific Committee (ISC) ^{4/} regarding measures to protect the northern spotted owl, a threatened species. Further, appellants challenged the adequacy of the BLM "Jamison Plan" for compliance with the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (1988). Appellants further protested the failure to follow the "50-11-40" rule regarding timber retention for dispersal habitat for the spotted owl. ^{5/} Appellants' protest also challenged the legal sufficiency under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988), of the environmental analysis conducted by BLM, asserting that preparation of an environmental impact statement (EIS) is required. Additionally, appellants asserted that the timber sales are inconsistent both with obligations under the Act of August 28, 1937 (O&C Act), 43 U.S.C. §§ 1181a-1181f (1988), to protect watersheds and provide recreational facilities and with the multiple-use objectives set forth in section 302(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(a) (1988). Appellants also protested the failure of BLM to analyze the impact of the timber sales on the accumulation of carbon dioxide in the atmosphere and on global warming. The protest also challenged the failure of BLM to consider the impact of the sales on the marbled murrelet. The timber sales were asserted to involve habitat modification constituting an unlawful "taking" under both the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§ 701-718 (1988), and the ESA.

The BLM decisions from which these appeals have been brought responded in substantial detail to the issues raised by the protest. Thus, for example, with respect to the Bar First Go Round Salvage Sale, BLM explained that:

Any destruction of NSO [northern spotted owl] habitat that has occurred in the Bar First Go Round Salvage timber sale area has been the result of natural forces, in this case a catastrophic windstorm event. Execution of the timber sale contract and subsequent regeneration of the harvest area, in accordance with our existing land use plan, has been determined to have no effect on the NSO.

* * * * *

Although the Bar First Go Round Salvage timber sale is located within an HCA, the sale itself does not involve NSO habitat, defined as green trees greater than 80 years old,

^{4/} These recommendations are contained in a published report. Interagency Scientific Committee to Address the Conservation of the Northern Spotted Owl, A Conservation Strategy for the Northern Spotted Owl (May 1990) (hereinafter cited as the ISC Report).

^{5/} Adequate dispersal habitat is ensured by requiring that "50% of the forest matrix outside of HCAs [habitat conservation areas] be in stands with an average d.b.h. of 11 inches and a 40% canopy closure." ISC Report at 27.

or dispersal habitat as defined by the "50-11-40" rule. The sale only involves down timber, with no standing green timber included. The sale reserves sufficient down logs as required by Bureau policy and does not impact the NSO.

* * * * *

[T]he salvage of blowdown timber does not affect the "50-11-40" standard because blowdown trees do not contribute to the canopy closure.

(June 25, 1991, Decision at 2-3). Thus, it is clear that the "50-11-40" standard refers to live, growing timber and not to the salvage of dead and blown-down trees.

Further, regarding the impact of the timber sales on the marbled murrelet, BLM responds that: "Since this timber sale would only harvest damaged and blown down trees and proposes no harvesting in 'old growth and mature stands,' the potential for impacting the marbled murrelet does not exist." *Id.* at 9. The decision also notes that reduction in habitat has not been held to constitute a "taking" under the terms of the MBTA.

In their notice of appeal and statement of reasons (SOR) for appeal to this Board, appellants have repeated almost verbatim the same grounds for challenging the timber sales set forth in their protest. The SOR does not even acknowledge the decision reached by BLM on the issues raised by the protest and, with one exception, does not challenge the grounds for rejecting the protest cited by the BLM decisions. In cases such as this, where our review of the record shows that the BLM decision was responsive to the issues raised in the protest and was legally sufficient in all material respects, the decision may be affirmed on appeal without addressing in further detail all the issues resolved in the protest. In this case we find it appropriate to address the issues raised by appellants entailing significant legal questions.

Appellants' arguments on appeal focus upon four Federal statutes: the MBTA; the O&C Act; the NEPA; and the ESA. 6/ Our decision will be similarly organized.

6/ Appellants have also argued on appeal for the first time that the Salem District Office of BLM has failed to comply with provisions of the Jamison Plan calling for preparation of a preharvest/postharvest profile of forest habitat under the "50-11-40" guideline. BLM has responded on appeal by noting that this analysis was undertaken for all sales that actually harvest standing timber. Again, as in the protest decision, BLM pointed out that the "50-11-40" guideline applies to the harvest of green trees and not to the salvage of dead and blown-down timber which has no effect on average stand diameter or crown closure.

A.

The MBTA provides, in part, that "[u]nless and except as permitted by regulations * * * it shall be unlawful at any time, by any means or in any manner, to * * * take, capture, kill, [or] attempt to take, capture, or kill * * * any migratory bird." 16 U.S.C. § 703 (1988) (emphasis supplied). Appellants contend that BLM's salvage harvests will violate this provision of the Act. The migratory bird that appellants claim may be "taken" by the instant timber sales is the marbled murrelet (Brachyramphus marmoratus). See 50 CFR 10.13. Appellants charge that BLM's timber sales will destroy the habitat of the marbled murrelet and threaten the bird with extinction, the ultimate taking under MBTA (SOR at 5-6).

[1] In a recent case the United States District Court for the Western District of Washington rejected a similar argument. In Seattle Audubon Society v. Robertson, No. C89-160WD (W.D. Wash. Mar. 7, 1991), a case involving timber sales by the Forest Service, U.S. Department of Agriculture, the court stated:

Whether the Forest Service's timber management plan, or timber sales fashioned pursuant to it, violate MBTA depends on the interpretation of "taking." Under the regulations promulgated pursuant to MBTA, to "take" is to "pursue, hunt, shoot, wound, kill, trap, capture, or collect," or to attempt any such act. 50 C.F.R. § 10.12. Under ESA, to "take" is to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532 (1988). "Harm" under ESA means

an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

[Plaintiff] asks the court to engraft ESA's broader definition of a "taking" onto MBTA. It relies upon a Supreme Court case declaring protection of migratory birds to be a "national interest of very nearly the first magnitude," State of Missouri v. Holland, 252 U.S. 416 (1920), and another stating that ESA sheds light upon similar terms in MBTA, Andrus v. Allard, 444 U.S. 51, 62 (1979).

But the differences between a "taking" under ESA and MBTA are distinct and purposeful. ESA, enacted in 1973, included "harass" and "harm" in the definition. Pub. L. 93-205, § 3, 87 Stat. 885. Congress amended MBTA the following year, and did not modify its prohibitions to include "harm." Pub. L. 93-300, § 1, 88 Stat. 190. It is the "harm" part of the definition that makes

"significant habitat modification or degradation" illegal. The court cannot do what Congress, and the Department of Interior, did not do. The statute and regulations intended to preserve an endangered or threatened species differ from those adopted pursuant to international treaties.

Id. at 24-25. Having so concluded, the court held that the award of a timber sale by the Forest Service did not involve a taking of migratory birds within the meaning of MBTA.

The court's analysis was subsequently adopted in Portland Audubon Society v. Lujan, No. 87-1160-FR (D. Or. May 8, 1991). MBTA was not intended to include habitat modification or degradation in its prohibitions, the court concluded. 7/ Id. at 17. We find this analysis compelling and reject appellants' contention.

Prior to either of these district court decisions, the Board rejected a similar argument advanced by appellants in Oregon Natural Resources Council, 116 IBLA 355, 369 (1990). The basis for our holding in that case was appellant's failure to show that previous or proposed harvesting resulted in or threatened to cause the death of any migratory bird. A similar shortcoming is manifested in appellants' position in the present appeals and we would reach the same conclusion here without relying upon the Seattle Audubon Society or Portland Audubon Society cases discussed above. Appellants have again failed to show that previous or proposed harvesting would result in or threaten to cause the death of any migratory bird or the spotted owl.

B.

The Act of August 28, 1937, provides that certain reverted lands of the Oregon and California Railroad (O&C lands) are to be managed for permanent forest production, 8/ and the timber thereon sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities. 43 U.S.C. § 1181a (1988).

Appellants contend that this Act calls for multiple use of the O&C lands within the instant timber sales. Managing these lands for a permanent source of timber is but one of several types of forest production,

7/ See also 56 FR 28362, 28365 (June 20, 1991): "Marbled murrelets are protected from 'take' by the Migratory Bird Treaty Act (16 U.S.C. 703 et seq.), but no protection is afforded habitat under the statute."

8/ Lands so managed are those "portions of the reverted Oregon and California Railroad and Reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior, which have heretofore or may hereafter be classified as timberlands, and power-site lands valuable for timber." 43 U.S.C. § 1181a (1988).

appellants argue. Other uses identified by the Act are protecting watersheds, regulating stream flow, and furnishing recreational facilities. Moreover, appellants urge, Congress mandated multiple-use management of public lands in section 302 of FLPMA, 43 U.S.C. § 1732 (1988). Nowhere in this statute or legislative history did Congress express an intent to exempt O&C lands from the principle of multiple use, appellants state. As wildlife protection is one of the multiple-use objectives that must be considered under FLPMA, BLM must consider this use in managing the sale areas at issue (SOR at 13).

[2] In Headwaters, Inc. v. Bureau of Land Management, 914 F.2d 1174 (9th Cir. 1990), the Court of Appeals for the Ninth Circuit considered a similar argument and found it without merit. The court stated:

We have previously observed that "[t]he provisions of 43 U.S.C. § 1181a make it clear that the primary use of the [O & C Act] lands is for timber production to be managed in conformity with the provision of sustained yield." O'Neal v. United States, 814 F.2d 1285, 1287 (9th Cir. 1987); see also Skoko v. Andrus, 638 F.2d 1154, 1156 (9th Cir.) (Skoko) (The O & C Act "provided that most of the O & C lands would henceforth be managed for sustained-yield timber production."), cert. denied, 444 U.S. 927, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979).

While these statements are arguably dicta, we are convinced of their accuracy. * * * Headwaters argues that the phrase "forest production" in section 1181a encompasses not merely timber production, but also conservation values such as preserving the habitat of the northern spotted owl. However, Headwaters' proposed use--exempting certain timber resources from harvesting to serve as wildlife habitat--is inconsistent with the principle of sustained yield. As the statute clearly envisions sustained yield harvesting of O & C Act lands, we conclude that Headwaters' construction is untenable. There is no indication that Congress intended "forest" to mean anything beyond an aggregation of timber resources.

Id. at 1183.

Similar holdings were reached in Portland Audubon Society v. Lujan, supra at 11-12, and Oregon Natural Resources Council, supra at 371-72. We agree with these decisions and conclude, as did each of the three decisions, that BLM did not err in construing the O&C Act as establishing timber production as the dominant use.

Appellants' argument that FLPMA precludes the timber sales at issue because that Act dictates management for multiple use was addressed in Oregon Natural Resources Council, supra at 372. Our conclusion in that decision is applicable to the timber sales now under consideration. Section 302(a) of FLPMA requires multiple-use management of the public lands "except * * * where a tract of such public land has been dedicated to specific uses according to any other provisions of law." Section 1 of the O&C Act dedicates the O&C lands to sustained-yield timber production.

C.

NEPA requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(c) (1988). To determine the nature of the environmental impact of a proposed action and whether an EIS will be required, Federal agencies prepare an environmental assessment (EA). 40 CFR 1501.4(b), (c). If, on the basis of the EA, the agency finds that the proposed action will produce "no significant impact" on the environment, an EIS need not be prepared. 40 CFR 1501.4(e); Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 319 (1985).

NEPA has been violated, appellants contend, by BLM's failure to address in its EA's the impacts of the disputed salvage sales on the marbled murrelet. The murrelet is a robin-sized bird that has been proposed for listing as threatened by the U.S. Fish and Wildlife Service (FWS). 56 FR 28362 (June 20, 1991). Appellants charge that further violations are evident in the agency's failure to address the cumulative impacts of timber harvests, the increase of carbon dioxide in the atmosphere, and the effects of harvest on old-growth dependent species.

BLM points out in its decisions of June 25, 1991, as noted above, that appellants' objections are not site-specific and fail to appreciate that the timber to be sold in the timber sales at issue is already down on the ground. The proposed action, BLM explains, is to salvage this fallen timber, and thereby capture its economic value, reduce possibilities of theft and insect/disease infestation, and remove potential road hazards. Moreover, appellants overlook the fact that an EIS was prepared in December 1981 and that the instant sales are to be conducted in accordance with its terms, BLM states.

The EIS that BLM refers to is the Westside Salem Timber Management Final EIS (FEIS). This document served to support the Westside Salem Timber Management Plan Record of Decision, dated September 9, 1983. In addition to these studies, BLM prepared EA's which are tiered to the EIS. The EA's examined the impacts of each of the proposed sales on soils, vegetation, cultural resources, water quality, and wildlife. Because five of the six sales are located in stands over 80 years old, the discussion of wildlife focused upon the northern spotted owl (Strix occidentalis caurina), a species associated with old-growth forests or forests with old-growth structural and vegetational characteristics. 55 FR 26114, 26139 (June 26, 1990). Design features and mitigation measures were also considered in the EA's. BLM concluded that no significant impacts would occur to the human environment.

Appellants are correct in stating that BLM did not address in its EA's the impacts of the instant sales upon the marbled murrelet. This omission may be due in part to the fact that BLM prepared its EA's several months prior to the proposed listing of the murrelet on June 20, 1991. As noted above, BLM stated in its June 25, 1991, decision that there was no potential

impact on this species because the instant sales do not involve old-growth or mature stands which could comprise habitat, but rather damaged and blown-down trees.

[3] We find no error in the agency's action. We so hold because nowhere in appellants' protest or SOR is there an allegation that the marbled murrelet is found in any of the sale areas. Further, we have no indication that the murrelet would otherwise be affected by the salvage harvest of dead and blown down timber. It was appellants' burden to establish that BLM erred in omitting to address any impacts to the murrelet. Where, as here, the murrelet may be entirely absent from the area, 9/ appellants have failed to carry their burden of demonstrating error on BLM's part. See Oregon Natural Resources Council, supra at 369.

In response to appellants' charge that BLM has failed to assess the cumulative impacts of harvest, the decisions on appeal correctly note that cumulative impacts had been addressed in the Westside Salem Timber Management FEIS. See draft Westside Salem Timber Management EIS at chapter 3. The instant EA's tier to this FEIS and incorporate its language. No need exists, therefore, for BLM to repeat its cumulative impact analysis in the individual sale files. 40 CFR 1500.4(i).

In response to appellants' arguments that NEPA has been violated by BLM's failure to address carbon dioxide buildup and global warming, BLM's decision of June 25, 1991, states at page 8:

There is no agreed upon research that has determined the cumulative effects of timber harvest on releasing of CO₂ and global warming.

The calculations of Harman, et al, cited in the protest, indicate that harvest of a million acres of old-growth forest in the northwest United States would add less than one-tenth of one percent to the total carbon currently in the atmosphere. Current rates of timber sales on Federal lands in the Pacific Northwest (only a small amount of old-growth remains on non-Federal lands) would not result in a cumulative harvest of as much as a million acres of old-growth forest in the span of a decade. Thus, the cumulative effect of all such harvest would be to add less than one-tenth of one percent to the total carbon in the atmosphere. The possible effect of this addition on global warming (itself uncertain of prediction) is too small to estimate.

Appellants' SOR does not respond directly to BLM's finding that the cumulative impacts of timber harvests on global warming are too small to

9/ The majority of marbled murrelet detections in Oregon occur within 12 miles of the coast. Although these timber sales are outside this coastal zone, some murrelets are found on rivers and inland lakes up to 50 miles from the ocean. 56 FR 28362, 28365 (June 20, 1991).

estimate. Instead, appellants repeat their protest argument, which relies upon a draft report of the Oregon Department of Energy and a newspaper story. Both the draft report and newspaper story state that logging old-growth forests contributes to global warming by releasing significant amounts of carbon dioxide into the atmosphere.

The parties do not dispute that carbon dioxide is released by timber harvests. What is at issue is whether BLM erred by not addressing global warming in its EA or EIS. In these circumstances, we find no error in BLM's failure to formally consider the impact on the environment from the release of carbon dioxide. BLM is not required to consider speculative environmental impacts. See Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974). Appellants have presented virtually no evidence regarding global warming or the extent that harvesting fallen timber would contribute to that phenomenon. We can hardly fault BLM for failing to consider these matters in its EA's.

In Southern Utah Wilderness Alliance, 114 IBLA 326, 332 (1990), we held that a determination that a proposed action will not have a significant impact on the quality of the human environment will be affirmed on appeal if the record demonstrates that a careful review of environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. A party challenging the determination must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Mere differences of opinion provide no basis for reversal of BLM's decision if the decision is reasonable and supported by the record on appeal.

After review of the record we conclude that BLM has not erred in this regard. Key to our conclusion is appellants' failure to respond substantively to BLM's finding that the cumulative effect of timber harvests on global warming is too small to estimate. As noted supra, appellants' repetition of their protest arguments in their SOR is ill suited to satisfy their burden of demonstrating error in BLM's decision.

Few words need be said about appellants' argument that BLM has not addressed the impacts of salvage harvests on old growth and old-growth dependent species. Each of the EA's, as noted above, contains a discussion of soils, vegetation, water, and cultural resources. Each EA discusses the northern spotted owl, a species associated with old-growth forests or forests with old-growth structural and vegetational characteristics. Our discussion infra of the effects of the instant salvage sales on this species indicates that BLM properly concluded that no significant impacts to the human environment would result from these sales.

D.

The ESA requires each Federal agency, in consultation with the Secretary, to ensure that any action carried out by the agency is not likely to

jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of critical habitat for such species. 10/ In fulfilling these duties, each agency is to use the best scientific and commercial data available. 16 U.S.C. § 1536(a) (1988). ESA further requires each Federal agency to confer with the Secretary on any agency action likely to jeopardize the continued existence of any species proposed to be listed or result in the destruction or adverse modification of critical habitat proposed to be designated. 16 U.S.C. § 1536(a)(4) (1988).

Regulations implementing ESA require an agency to determine whether its actions may affect listed species or critical habitat and, if so, to initiate formal consultation with FWS. 50 CFR 402.14. When Federal action is likely to jeopardize the continued existence of any proposed species or adversely modify proposed critical habitat, regulation 50 CFR 402.10 requires the agency to confer with FWS.

Appellants contend that BLM has violated ESA and 50 CFR 402.14 by failing to enter formal consultation with FWS. At issue here, appellants argue, is BLM's conclusion that the salvage sales will have no effect on the northern spotted owl or its habitat. Fallen trees are suitable habitat for the northern spotted owl, appellants state, because such trees provide openings and a prey base for the owl.

The best scientific and commercial data available, appellants contend, is the May 1990 ISC report. This report recommended, inter alia, that logging (including salvage operations) cease within certain habitat conservation areas (HCA's) and that 50 percent of forest landbase outside of HCA's be maintained in stands of timber with an average diameter at breast height of 11 inches or greater and at least 40-percent canopy closure (the "50-11-40" rule) (ISC Report at 4).

Appellants also charge that BLM has violated 50 CFR 402.10 by its failure to confer with FWS regarding the marbled murrelet. The instant sales are likely to jeopardize the continued existence of the murrelet, appellants contend, thereby triggering BLM's duty to confer. Moreover, BLM Manual 6840.06B provides that species proposed for listing as threatened or endangered and proposed critical habitat shall be managed with the same level of protection provided for threatened and endangered species, except that formal consultations are not required, appellants note.

In its decision, BLM states that the instant salvage sales will have no effect on the northern spotted owl or its habitat because the trees to be harvested are on the ground and no longer serve as suitable habitat for the owl. 11/ In response to appellants' assertion on appeal that the salvage of

10/ This duty does not extend to an agency that has been granted an exemption under 16 U.S.C. § 1536(h) (1988).

11/ This finding was made in most cases by BLM's wildlife biologist, a member of an interdisciplinary team responsible for assembling data for the EA's.

downed woody material impacts the northern spotted owl habitat, BLM acknowledges that natural openings created by fallen trees are components of suitable owl habitat. In recognition of this, BLM policy is to maintain at least two pieces of large downed woody material and two standing wildlife trees per acre which will contribute to the downed woody material in the future when they fall. These features of the harvest plan, BLM concludes, support a finding that the disputed sales will have no effect on the northern spotted owl or its habitat 12/ (Response to SOR, Aug. 16, 1991, at 3-4).

With regard to ESA's requirement that the agency use the best scientific and commercial data available, BLM states that it considers the ISC report to be a benchmark for the development of its resource management plans. Before such plans are adopted, extensive public involvement, as required by FLPMA and NEPA, is required (Appendix B to BLM Decision, June 25, 1991, at 9-10).

[4] As noted above, regulation 50 CFR 402.14 requires BLM to consult formally with FWS if its actions may affect a listed species, such as the northern spotted owl, or its critical habitat. There is no question that BLM did not consult with FWS here. Appellants' concern that removal of downed trees reduces the owl's prey base is answered by the agency's harvest plan, as described above. Nowhere in the record do appellants respond directly to those features of the harvest plan that call for at least two downed trees and two standing wildlife trees to remain per acre. Nowhere in the record do appellants offer evidence of a wildlife biologist to counter the "no effect" finding of BLM's wildlife biologist. Viewing the record as a whole, we hold that appellants have not established by a preponderance of the evidence that the instant salvage sales and harvest may affect the northern spotted owl or its habitat or that BLM should have initiated formal consultation with FWS. Accordingly, no violation of 16 U.S.C. § 1536(a)(1), (2) (1988) or 50 CFR 402.14 is apparent from the record.

Regarding the marbled murrelet, BLM's obligation is to confer with FWS if its actions are likely to jeopardize the continued existence of this bird. We have previously mentioned that appellants have not alleged and the record does not show that the murrelet is found in any of the sale areas. In the absence of proof that the murrelet uses the sale areas, it is plain

12/ On Aug. 13, 1991, FWS proposed to designate 8.2 million acres as critical habitat for the northern spotted owl in Washington, Oregon, and California. 56 FR 40002 (Aug. 13, 1991). Two of the instant sales are within areas so proposed. These are the Elk Run Salvage in sec. 19, T. 13 S., R. 8 W., Willamette Meridian, 56 FR 40100 (Aug. 13, 1991), and the Bar First Go Round in secs. 13 and 14, T. 4 S., R. 7 W., Willamette Meridian, 56 FR 40102 (Aug. 13, 1991).

These two sales and also the Briar Split Salvage and Hull Park/Bummer Ridge Salvage are within HCA's set forth in the ISC report.

that no violation of 16 U.S.C. § 1536(a)(4) (1988) or 50 CFR 402.10 has been shown.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Alsea and Yamhill Resource Area Managers are affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge